SHRIVER CENTER
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ILLINOIS HAS COMMITTED TO COVERING EVERYONE CONGRESS HAS MADE ELIGIBLE FOR MEDICAID

This memo concludes that the Illinois General Assembly is solidly on record, with bi-partisan majorities, in support of adopting the steps Congress has taken to cover all low income citizens under the Medicaid program, filling historic gaps in the program that had denied coverage to the very poorest of the nation's uninsured. The memo further concludes that nothing in the Supreme Court's NFIB v. Sebelius decision is inconsistent with or undoes the commitment the state has already made.

1. The Illinois Temporary Moratorium on Medicaid Expansions and its Exceptions

The Illinois General Assembly has twice voted with bi-partisan majorities to authorize the Medicaid eligibility expansion that is part of the Affordable Care Act. In the 2011 Medicaid Reform Act, and again in the recently passed HB 5007, the General Assembly adopted a temporary moratorium on Medicaid expansions, subject to the following exception: "This moratorium shall not apply to expansions required as a federal condition of State participation in the medical assistance program". 305 ILCS 5/5-1.4 (emphasis added). The Affordable Care Act was already the law of the land when the General Assembly passed both of these laws. The clear intent was that Illinois comply with the Affordable Care Act's Medicaid expansion, unless it was struck down or repealed. To analyze the impact of the Supreme Court's decision on the state's decision to implement the Affordable Care Act, the focus is on the word "required" – that is, after the Supreme Court's decision, is the Medicaid expansion still "required" for purposes of the exception to the moratorium.

2. What the Federal Medicaid Law says

In the federal Medicaid statute, the "requirements" for states are set forth as elements of the state plan in 42 U.S.C. 1396a. Section 1396a(a)(10)(A) covers which groups of individuals the states are required to make eligible and which additional groups the states have the option to make eligible. Subsection (i) specifies the groups that states are required to include, while subsection (ii) specifies the groups that are "optional" for states to include. Congress added the Affordable Care Act's expansion as a new subsection (VIII) to subsection (i), joining it to the list of the required coverage groups. The statute's long tree of provisions looks like this:

42 U.S.C. 1396a State plans for Medical Assistance

(a) Contents
A state plan for medical assistance must –

…

(10) provide

(A) for making medical assistance available … to –

(i) all individuals –

…. [subsections I-VII list pre-ACA mandatory Medicaid groups]

(VIII) beginning January 1, 2014, …[adding the new ACA group]

(ii) at the option of the State, to…. [listing optional coverage groups]

Thus, the whole citation for the ACA's Medicaid expansion is 42 U.S.C. 1396a(a)(10)(A)(i)(VIII). It is unquestionably contained in the category of groups that a participating state is "required" to cover. In fact, to sharpen this conclusion, the immediately following section of the statute begins the list of groups that the state has the option to cover. The ACA provision is clearly in the required group.

3. What the Supreme Court said

The Supreme Court's decision in NFIB v. Sebelius did nothing to disturb the "required" nature of the ACA provision. It did not move it into the optional part of the federal Medicaid law. It did not remove it from the list of groups that a state is required to cover. Instead, it removed the most aggressive of the federal penalties that HHS may levy against non-complying states. It decided that the federal authorities may not fully defund the existing state Medicaid programs if the state refuses to comply with the ACA's Medicaid expansion. It removed the most aggressive penalty, but not all penalties or incentives or inducements. The Secretary of HHS still has enforcement and inducement tools to prompt compliance.

Chief Justice Roberts acknowledged that the ACA's Medicaid expansion is "required", and that truncating the authority of the Secretary of HHS to enforce the requirement does not make it any less of a requirement. He was limiting the enforcement power, not ending it. He wrote:

> [T]he Secretary cannot … withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. … That fully remedies the constitutional violation we have identified. (Opinion, at p. 56) (emphasis added)
>
> The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. (Opinion, at p. 57) (emphasis added)

The NFIB decision, as a practical matter, certainly gives the states more of a choice, because it limits the consequences of a decision not to comply with the requirement that Medicaid be expanded. But the requirement remains, and so do other consequences for failure to comply (which might include tighter audits, closer scrutiny of waivers and state plan amendments, financial penalties short of full de-funding, ineligibility for incentives or other inducements that accompany the expansion). The bottom line is that the expansion is "required".

4. What this means for Illinois

Illinois has already decided, twice and with bi-partisan majorities both times, to comply with the required expansion of Medicaid specified in the Affordable Care Act. The General Assembly passed the exception to the moratorium for "required" expansions precisely for that reason – it had no other expansion in mind. Since the expansion remains required in federal law, there is no need for the General Assembly to amend the moratorium law.

Note, however, that between now and January 2014, Illinois will need to amend Article 5 of the Public Aid Code to add the new eligibility group (and make other conforming amendments). The sooner the better for those amendments, so that DHFS has clarity for planning and the state's FY14 budget can reflect whatever modest changes are necessitated by the 100% federally funded Medicaid change.

5. Suggestions on messaging

It is not accurate or useful in public statements to refer to compliance with the Affordable Care Act as the state taking an "option", nor to refer to the Medicaid change as an "expansion". It is not, in fact, an "option", and referring to it that way undermines the correct interpretation of the moratorium law outlined above. The state is complying with federal law. The term "expansion", while accurate in a dictionary sense, conveys the sense of the State making a major new initiative on its own, which carries with it concerns about cost. It is more useful to say that the state is "making Medicaid available to all eligible people." That is, the federal government is making coverage available, free of charge for three years, and Illinois is implementing it as intended. In addition, it is useful to keep this Medicaid change within the larger health care reform strategies. It is not a free-standing move just for the poor. So, the change will "fill the gaps in coverage for the lowest income vulnerable people", but it is also "part of the solution to the larger problems of the uninsured and the cost of healthcare". By covering a large group of the uninsured, the change will greatly reduce the cost-shift to privately insured people caused by the free-care demands of the uninsured (estimated at $1,000 per year higher premiums for insured people). Covering the uninsured also makes it possible for them to develop a relationship with a regular doctor. That, in turn, makes possible all of the health care strategies that lead to lower costs and better health outcomes: prevention, wellness advice, early detection of conditions, maintenance therapies, maximum use of health information technology, care coordination. See our recent blog post, "Expanding Medicaid: the Choice is Clear", for the top 12 reasons it makes sense for Illinois to comply with the Affordable Care Act. http://www.theshriverbrief.org/2012/07/articles/health-care-justice/expanding-medicaid-the-choice-is-clear/.

6. The "woodwork effect" is not a valid cost of the Medicaid expansion

Most planners expect that in 2014 the publicity around the implementation of the large public and private coverage provisions of the Affordable Care Act will draw eligible but currently not enrolled people "out of the woodwork" to enroll. DHFS estimates that this will account for 1/3 of the 500,000 new Medicaid enrollments. Those enrollees mostly will be covered with 50% federal match instead of 100% for the new group. Opponents of the Medicaid expansion assign this "woodwork effect" as a cost of the expansion, in efforts to oppose Illinois' participation. That is not accurate or fair, and proponents should not accede to that analysis. Even without the Medicaid expansion, the "mandate" and the "Exchange" will take effect in 2014. Especially the mandate, with its message that all must have insurance, will account for the "woodwork effect". One cannot assign that inevitable phenomenon to one cause or another. The Medicaid expansion must be costed-out on its own terms (100% federal). The woodwork effect will happen regardless.

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